

No. 10136

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CLIFFORD W. TWOMBLY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

FILED

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BRIEF OF APPELLEE.

Statement of Basis of Jurisdiction.

The opening brief in the Edgerton appeal sets forth the basis of jurisdiction, and reference is made thereto.

Statement of the Case.

ISSUES PRESENTED BY INDICTMENT.

Appellee, United States of America, hereby adopts the statement of the case as set forth in its Answering Brief to appellant Edgerton's brief, and respectfully refers the Court thereto.

Statement of Facts.

We adopt the statement of facts as set out in the Answering Brief of appellee, United States of America, to the Brief of appellant, J. Howard Edgerton, and, in addition thereto, for the purpose of identifying the appellant C. W. Twombly to the matters involved, we set forth the following facts:

Appellant C. W. Twombly became general manager of the First Security Deposit Corporation on or about November 1, 1934, and severed his connection with said corporation on or before December 21, 1938; that appellant C. W. Twombly was general manager for the First Security Deposit Corporation from on or about November 1, 1934 to on or about September 21, 1938. He was also secretary of First Security Deposit Corporation from on or about November 1, 1934 to on or about September 21, 1938, and he was a director of said corporation from on or about December 1, 1934 to on or about December 21, 1938. He was a member of the executive committee of said corporation from on or about February 19, 1936 to on or about September 21, 1938 [R. 274].

As to the Investment Finance Company, he was secretary from on or about September 5, 1935 to on or about September 12, 1938. He was also treasurer for said company from on or about September 5, 1935 to on or about March 7, 1939. He was also general manager for said company to on or about September 21, 1938, and was a member of the board of directors from on or about September 5, 1935 to on or about December 21, 1938 [R. 276].

As of August 18, 1937, appellant C. W. Twombly owned 260 shares of stock of the Investment Finance Company [R. 288]. Appellant Twombly acquired 10 shares of said stock on or about October 5, 1935, for which he paid \$10 in cash [R. 577]. On July 6, 1936 appellant Twombly acquired 10 shares of stock in said company for which he paid \$10 in cash [R. 287]. On December 30, 1936, he acquired 240 shares of stock in said company for which he paid \$240 in cash [R. 560].

That on or about November 9, 1936, defendants R. W. Starr, J. Howard Edgerton, E. C. Thomas, C. W. Twombly, and J. L. Smale attended a meeting of the board of directors of Investment Finance Company at which time the following resolution was adopted:

“WHEREAS, it appears for the best interests of this corporation that substantially all of the assets of the Consolidated Investors, a California corporation, be purchased by this corporation for a sum not to exceed \$36,000.00 in cash;

“Now, THEREFORE, BE IT RESOLVED, that the officers of this company be and they are hereby authorized to negotiate, enter into all necessary contracts with respect to, and execute any and all necessary instruments necessary to complete the purchase of substantially all of the assets of the Consolidated Investors, a California corporation, including the following securities:

- 3375 shares Common Stock of the First Security Deposit Corporation,
- 2331 shares of Class A. Preferred Stock of the First Security Deposit Corporation, with a total par value of \$46,620.00;
- 827 shares of Class B. Preferred Stock of First Security Deposit Corporation, with a total par value of \$16,540.00;
- 209 Full Paid Income Shares of the Railway Federal Savings & Loan Association, with a total par value of \$20,900.00 (said shares in the amount of \$15,000 being subject to a hypothecation agreement with one F. E. Jones, said hypothecation agreement being guaranteed by R. W. Starr, J. H. Edgerton, A. R. Ireland, C. E. Thomas, F. A. Anderson, and W. S. Brayton).”

This transaction was consummated by the payment of \$36,000.00 by the Investment Finance Company to the Consolidated Investors.

On November 16, 1938 at a meeting of the board of directors of First Security Deposit Corporation, with the following directors present: R. W. Starr, E. C. Thomas, A. R. Ireland, C. W. Twombly, and Wm. Leffert, on motion of Mr. Thomas, seconded by Mr. Twombly, and carried, the sale of 13 first trust deeds in the sum of \$13,407.62 was made to the Investment Finance Company for First Security Deposit consolidated trust bonds and interest in the amount of \$13,409.09 [R. 583].

At a meeting of the board of directors of Investment Finance Company held on October 13, 1936, at which time the following directors were present: R. W. Starr, J. H. Edgerton, C. W. Twombly; absent: Messrs. E. C. Thomas and J. L. Smale, the following action took place:

“The meeting was called for the purpose of further discussing plans, terms, conditions and mode of procedure in connection with the change of ownership of the American National Bank of Santa Monica, California.

“It was proposed that this corporation loan the sum of \$40,000.00 or buy stock in the sum of \$40,000.00 in the said bank, an equal amount to be put up by Batelle-Dwyer and Company, for the purpose of acquiring sixty per cent of the capital stock of the said bank; that a plan be followed as deemed advisable by Mr. Edgerton, Dr. Starr and Mr.

Twombly either as to the purchase of the shares and the formation of a voting trust, a loan to Batelle-Dwyer and Company, or a combination loan and purchase to be worked out on terms decided by Mr. Edgerton, Dr. Starr and Mr. Twombly.

"This is signed by J. H. Edgerton, Chairman, C. W. Twombly, Secretary." [R. 374-375.]

At a meeting of the board of directors of Investment Finance Company, held on January 19, 1938, at which time the following directors were present: R. W. Starr, E. C. Thomas, J. H. Edgerton, J. L. Smale, C. W. Twombly, and A. R. Ireland, the following action took place:

"On motion of Mr. Smale, seconded by Mr. Thomas and Terry, it was resolved that Mr. Twombly and Mr. Edgerton place such value as they saw fit on assets purchased from the Consolidated Investors in order that the segregation values could be determined."

At a regular meeting of the board of directors of Investment Finance Company, held August 17, 1938, the following directors were present: R. W. Starr, C. E. Thomas, J. L. Smale, A. R. Ireland, and C. W. Twombly. In addition to the directors, J. H. Edgerton was also present. At this meeting, R. W. Starr, as chairman, and C. W. Twombly, as secretary, fixed the value of the assets purchased from the Consolidated Investors in the sum of \$36,000.00 [R. 549-552].

On November 4, 1937, appellant Twombly had a conversation with Alice Geddes, in which conversation appellant Twombly stated in substance: that the best offer on our holdings would be seventy cents on the dollar; that he felt in the future it wouldn't be as good, if they could offer us anything at all; that he felt that business conditions in general were very bad and in fact he, himself, wanted to withdraw from the company as soon as possible, as soon as he could settle his own business affairs with the company [R. 725].

That in the month of May or June, 1937, appellant Twombly had a conversation with Lyman S. Walker concerning conditions of the First Security Deposit Corporation; that he told Mr. Walker that they were in a bad condition and practically on the verge of bankruptcy; that the securities wasn't worth a lot of money, but that they could take care of them at some kind of a price for us, and that he stated a price that didn't satisfy us; that at or about this same time, appellant Twombly had another conversation with Lyman S. Walker in which conversation appellant Twombly stated in substance that inasmuch as the company was right on the verge of a breakdown, and that he told us he could give us around what he offered us before, maybe a dollar or more [R. 744-745].

POINT I.

Appellant Twombly Did Cause or Aid or Assist in Causing the Letters Charged in the Indictment to Be Mailed.

Appellant Twombly contends that the evidence without dispute indicates that appellant did not cause or aid or assist in causing the letters charged in the indictment to be mailed because:

- a. Appellant Twombly as a member of the Board of Directors of Investment Finance Company was absent from the meeting of the Board of Directors that hired C. L. Cronk, who was a defendant in the case, to contact the security holders of First Security Deposit Corporation for the purpose of obtaining their securities at a discount.
- b. That at other meetings of the Board of Directors of the Investment Finance Company he, as a member thereof, voted "no" to extend C. L. Cronk's employment.
- c. That all of the letters contained in the substantive, the counts of the indictment, were dictated by C. L. Cronk to Joan Marie Brauer employed by the First Security Deposit Corporation as switchboard operator, file clerk and stenographer.

C. L. Cronk was hired by the Investment Finance Company on or about June 24, 1937 and it is true that appellant C. W. Twombly was absent at that particular meeting of the Board of Directors [R. 277]. In pointing

out this fact appellant Twombly states in his brief, page 8, line 26, page 9, line 10,

“that at the next meeting it was resolved that Cronk’s employment be extended and Twombly voted ‘no;’ that at the next meeting it was voted that Cronk’s employment be extended and Twombly voted ‘no.’ At the next meeting it was again voted that Cronk’s employment be extended and Twombly voted ‘no.’”

However the record shows that the meetings referred to by appellant Twombly were not the “next meetings” after the hiring of Cronk on June 24, 1937, but to the contrary the meetings referred to were not held until August 17, 1938 [R. 872] September 21, 1938 [R. 873] October 19, 1938 [R. 873]. The earliest meeting was held over a year after C. L. Cronk’s employment.

Apparently appellant Twombly approved the employment of C. L. Cronk as the record shows from the date of the hiring of C. L. Cronk until August, 1938, the Board of Directors of the Investment Finance Company had held several meetings at which time appellant Twombly was a member thereof and attended said meetings which took favorable action by extending C. L. Cronk’s employment with the Investment Finance Company. These meetings were held on the following dates: May 25, 1938 [R. 874] June 1, 1938 [R. 875] July 20, 1938 [R. 542]. The minutes of each of the meetings of the Board of Directors are set out in detail in the appendix, pages 1 and 2.

The record also shows that in the meantime many of the letters charged to the indictment were sent out through the mail on the stationery of Investment Finance Company, over the signature of C. L. Cronk [R. 10-30]

Appellant Twombly admits this, but argues that although the minutes of those meetings were signed by him as secretary, whether or not he voted upon the resolution extending Cronk's employment, the records do not disclose, and we assume that he infers therefrom that the presumption should be, that he did not favor the extension of Cronk's employment. If we adopt appellant's reasoning on this particular phase we can say that, if because of appellant's absence from the Board of Directors' meeting which hired Cronk, the presumption is that he did not favor Cronk's employment, then by the same token because he was present at all other meetings of the Board of Directors which extended Cronk's employment, he was in favor thereof. At least he thereby acquiesced in the action taken by the Board of Directors.

It Is Well Established That the Mailing of the Count Letters Need Not Have Been Personally Performed by the Defendants.

The following cases present varying examples of evidence deemed sufficient to meet the requirements of the statute:

United States v. Fleming, 18 Fed. 907;

Giles v. United States, 84 F. (2d) 943, 946 C. C. A. 5th);

Spear v. United States, 228 Fed. 485, 488 (C. C. A. 8th);

Barnard v. United States, 16 Fed. (2d) 451, 453 (C. C. A. 9th);

Greenbaum v. United States, 80 Fed. (2d) 113, 125 (C. C. A. 9th) (reversed on other grounds);

Lonergan v. United States, 95 Fed. (2d) 642, 643 (C. C. A. 9th).

In *Barnard v. United States*, page 453, this Honorable Court stated the following rule:

“The contention that the testimony was insufficient as to certain counts is based upon the alleged insufficiency to prove the use of the mail to execute the scheme. But the evidence was ample to show that the letters in question passed through the mail, and that they were placed in the mail by the agents or clerks of some of the plaintiffs in error. The plaintiffs in error, therefore, caused the letters to be placed in the Post Office to be sent or delivered, within the meaning of the mail fraud statute. (citing U. S. v. Kenofskey, 243 U. S. 440, 37 S. Ct. 438, 61 L. Ed. 836.)”

In *United States v. Fleming, supra*, page 908, the Court said,

“It is not necessary, in order to make out a case under the law, that the defendant shall be the inventor or originator of the scheme or artifice to defraud. * * * If a man adopts some old scheme which another devised and acts upon it, he has made it his own for the purposes of this act. It is also not necessary to show, in order to make out this offense, that the defendant’s actually, with their own hands, placed a letter or packet in a Post Office. If it appears from the proof that it was done through their agency or direction, by an employee or agent of the defendants, employed and directed for that purpose, it is enough.”

In *Davis v. United States*, 55 Fed. (2d) pp. 550, 552 (C. C. A. 5),

"It was not necessary to show that Davis had actually signed the letter or had personally deposited it in the mail. If it was mailed in furtherance of the scheme, in the usual course of business, and of this there could be no reasonable doubt, it was sufficient evidence to support the conviction."

The record also shows that appellant Twombly wrote some letters himself: Plaintiff's Exhibit 144 [R. 445-447]; Plaintiff's Exhibit 147 [R. 449-450]; Plaintiff's Exhibit 167 [R. 709-711].

The letters referred to bear the name of the Investment Finance Company. They were apparently posted from the company's place of business [R. 468-469] and were signed with the company's name with the purported signatures of appellant Twombly and the admitted employee C. L. Cronk, all of which sufficiently showed mailing of the letters by the appellant Twombly. (*Greenbaum v. United States*, *supra*.) Appellant Twombly admits that he was a Director and Secretary Treasurer of the Investment Finance Company from the date of its incorporation in 1935, continuing as such until December 21, 1938 and as its General Manager until September 21, 1938 (Brief p. 4, lines 12-16). He was also a Director and Secretary of First Security Deposit Corporation from December 1, 1934 to December 21, 1938 and its General Manager from November 1, 1934 to September 21, 1938 and also a member of its Executive Committee from February 19,

1936 to December 21, 1938. The record also shows that during that time he interviewed several of the security holders relative to persuading them to part with their securities at a discount [R. 727; 744].

We must assume that the duties of appellant Twombly, as an officer of the two companies, required his presence in the office of those concerns and that he interested himself in the general supervision of the office management and of the stenographic services. Therefore, the evidence is sufficient to infer mailing by appellant Twombly.

In the case of *Wells v. United States*, 9 F. (2d) 335, 337 (C. C. A. 9), the evidence showed the defendant's participation in a scheme to defraud by means of false representation including the defendant's presence in the office of the concern for several months, also defendant's interviews with prospective purchasers and a general supervision by him of the office and the stenographer, etc.. and the court held that such evidence was sufficient to sustain conviction though he did not sign either of the letters charged to have been mailed in execution of the scheme.

POINT II.

The Admissibility of Plaintiff's Exhibit 216 (Twombly's Statement) as an Admission Against Appellant Twombly Only Was Proper.

Appellant Twombly questions the admissibility of Plaintiff's Exhibit 216. As stated by him, appellant Edgerton covered the same point in his brief as Point VI, pp. 88-112. We stated in our answering brief thereto that the purpose of its introduction was upon two grounds:

1. As an admission against interest on the part of defendant Twombly, and
2. To show his joining the scheme or enterprise and as to him the existence of a scheme or enterprise, in other words an intent or knowledge [R. 732].

Because the introduction of said Exhibit 216 was limited to appellant C. W. Twombly, appellant Edgerton was not affected thereby. Consequently we confined our discussion in our answering brief to appellant Edgerton to the point only as it related to him, reserving any further comments thereon in answer to what might be raised by appellant Twombly. It appears that appellant Twombly has adopted appellant Edgerton's contention, that said Exhibit 216 was inadmissible as hearsay, and that a document written after the consummation of all the acts related therein is not admissible to show intent of the party making the statement.

To properly answer appellant Twombly on this point it will be necessary for us to become somewhat repetitious and make cross reference to the record, both to appellant

Edgerton's brief and the appellee's brief in answer thereto. As heretofore stated, Plaintiff's Exhibit 216 (the Twombly statement) was introduced as an admission against interest on the part of appellant C. W. Twombly.

We respectfully refer the court to our answering brief to appellant Edgerton, pp. 52-55 for authorities cited in support thereof and in addition thereto, cite the cases of

Brown v. United States, 150 U. S. 93, 98; 14 S. Ct. 37, 39; 37 L. Ed. 1010;

and

United States v. Wood, 39 U. S. 430, 14 Pet. 430, 10 L. Ed. 527,

which held that a man's own acts, conduct and declarations when voluntary are also admissible in evidence against him, and the rule stated in Wigmore on Evidence, volume IV, Section 1076, p. 116,

“* * * The principle is particularly illustrated by the rule in regard to the admissions of a *co-defendant in a criminal case*; here it has always been conceded that the admission of one is receivable against him only. * * *” (emphasis by the author).

It is apparent that both appellant Edgerton and appellant C. W. Twombly have overlooked the fact that Plaintiff's Exhibit 216 was introduced as an admission against its maker C. W. Twombly only, for they attack its inadmissibility on the following grounds:

1. Hearsay;
2. That it was offered as evidence of the truth of the matter asserted;
3. Time of its making.

(1) Admissions Are Either Not Within the Prohibition of the Hearsay Rule or Are an Exception.

"For example as an extra judicial statement it would ordinarily be obnoxious to the Hearsay rule; but admissions are either not within the prohibition of that rule, or are an exception to it; this being the ground for receiving admissions in general * * *. it suffices also for confessions." Volume III, Wigmore on Evidence, Section 816, p. 231, and

"* * *. any and every statement by an accused person, so far as not excluded by the doctrine of confession * * *, or by the privilege against self crimination * * *, is usable *against him* as an admission * * *. Thus, it is unnecessary for the prosecution to establish the propriety of such statement under the present Exception, because they would be in any case receivable as admission * * *" Volume VI, Wigmore on Evidence, Section 1732, p. 99 (emphasis by the author).

(2) Plaintiff's Exhibit 216 Was Not Offered as Evidence of the Truth of the Matter Asserted Therein.

As stated in our answering brief to appellant Edgerton on this point, p. 56, the trial court instructed the jury to that effect [R. 1032] and again the trial court made the following statement to the jury relative to the introduction of Plaintiff's Exhibit 216:

"The Court: Gentlemen of the jury, we have here admitted in evidence a document which will now be read to you by counsel for the plaintiff, the document having been admitted for a very limited purpose. You are all very intelligent men, and I believe are capable of following the direction of the court as to the law involved and that you will do so. * * * We describe this as a narration, as a narration of what has

happened in the past. Now that document isn't evidence which you may properly consider in any way, shape or manner, as against any defendant in this courtroom, including the defendant Twombly, except to show his intent in connection with the crimes charged. It is expressly limited to that. To illustrate whether or not those things were true or false would be immaterial so long as defendant Twombly thought they were true. If, thinking they were true, he did certain things, then they are admissible to show his intent under certain circumstances.

Now it is very important to these other defendants and to the defendant Twombly himself, that this document which contains statements about a lot of different matters, is only admitted for the purpose of showing Twombly's intent and is no evidence whatsoever, and this must be considered by you, as the truth of the statement made in this communication." [R. 791, 793.]

The Court also instructed the jury as follows:

"Now I want to talk to you a little bit about this exhibit 216, which as you will recall is the alleged statement of the defendant Twombly. You were admonished upon the truths of this evidence that the same was introduced against defendant Twombly only, and likewise restricted to the said defendant Twombly as bearing only upon the element of intent. Now in connection with that instrument, and also in connection with this audit report, exhibit 155, and any other exhibits which have been restricted to the subject of intent, you must be very careful not to consider as evidence in any way of the facts which are indicated or of the facts or declarations which are indicated in those instruments that are not evidence. They are only admitted for the purpose of showing what was the mental state, what was going

on in the minds of the parties who were involved * * *. You are not to consider the statement as determining the truth or falsity of matters therein related." [R. 1030, 1031.]

The rule is clearly stated in Wigmore on Evidence, Volume VI, Section 1766, pp. 177-178.

"The true nature of the Hearsay rule is nowhere better illustrated and emphasized than in those cases which fall without the scope of its prohibition. The essence of the Hearsay rule is the distinction between the testimonial or assertive use of human utterances and their non-essential use.

The theory of the Hearsay rule * * * is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extra judicial utterance is offered, not as an assertion to evidence the matter asserted, but *without reference to the truth of the matter asserted*, the Hearsay rule does not apply * * *." (Emphasis by the author.)

(3) **The Time and Place of the Making of an Extra Judicial Admission Does Not Effect the Use of Admissibility.**

Both appellant Edgerton and appellant Twombly point out that plaintiff's witness Webster testified that he had interviewed Twombly about the statement on July 9, 1940 and was told by him that it was the statement that he had given to Inspector Van Meter [R. 751; 774] and that in connection therewith the court instructed the jury that,

"there is no evidence before you as to when, after the defendant Twombly separated from said com-

panies, he wrote said statement, except as I have just stated" [R. 1031]

and further that the court instructed the jury that,

"as a matter of law it is to be presumed that the statement was made upon the last day that he was connected with said companies, to-wit: December 21, 1938 * * *." [R. 1032.]

(See Appellant Edgerton's brief, p. 97, and Appellant Twombly's brief, p. 33.) As stated heretofore in this brief as well as in our answering brief to appellant Edgerton, Plaintiff's Exhibit 216 was introduced as an admission against its maker appellant C. W. Twombly and at no time was it sought to be used as an admission of appellant Twombly against appellant Edgerton or any of the other defendants in the case. The court so instructed the jury [R. 1030] and particularly the court's instruction [R. 1023],

"* * * on the other hand if a conspiracy has come to an end either, by the accomplishment of the common design or by the parties abandoning the same, evidence of acts or declarations therafter made by any of the conspirators can be considered only as against the person doing such act or making such statement. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration."

The rule is well stated in 31 C. J. S., p. 1067, section 298, as follows:

"The time and place of the making of an extra judicial admission bear only on its weight and not on its

competency as evidence, except where it is sought to use the admissions of one person against another, in which case the time of the admission becomes material as bearing on whether the declarant, at the time of making this statement could by his statements, effect the party against whom the evidence is offered."

See also:

Marlenee v. Brown, 53 A. C. A. 929, 128 P. (2d) 137.

Appellant Twombly also makes mention of the fact that the statement contained in his admission, Plaintiff's Exhibit 216, was made after the consummation of all of the acts related therein and asks upon what theory could the document show the intent of appellant Twombly prior to the date on which it was written. (See Appellant Twombly's Brief, p. 32, lines 13 to 17.)

This question is answered by Wigmore on Evidence, Volume VI, Section 1732, p. 103, as follows:

"Statements *after the act*, stating the *past intent or motive* at the time of the act are of course admissible for him under the present Exception, though usable against the accused as admissions * * * but subsequent statements predicated *a then existing state of mind* are properly admissible under the present exception. No question is made about this when they are offered against the accused, because they are at any rate available as admissions. But they should be

equally admissible in his favor. In both cases the object is to ascertain his subsequent state of mind * * * and thence to infer his state of mind at the time of the act."

It is therefore obvious that the time and place of the making of the admission by appellant Twombly is not material.

Note: May we call the court's attention to a misstatement, no doubt inadvertently made by appellant Twombly in his brief on p. 34, line 5, which reads as follows:

"Now on this question of intent, if it is introduced for that purpose, it is not proper to introduce the whole document, regardless of where the chips may fall * * *."

The correct statement made by the court is as follows:

"The Court: Now on this question of intent if it is introduced for that purpose, is it not proper to introduce the whole document, regardless of where the chips may fall."

In other words, "It is not proper," should be corrected to read "Is it not proper." [R. 785-786.]

POINT III.

The Record Shows That There Is Substantial Evidence of Fact Which Excludes Every Other Hypothesis But That of Guilt.

The discussion herein is in reply to Point I of appellant's brief. The authorities cited by appellant Twombly under this point are elementary and no doubt contain a sound exposition of the law wherever applicable. However, in instant case, we believe the following chronological dissertation of the acts, conduct, and participation of appellant Twombly in the alleged scheme and artifice to defraud, as alleged in the Indictment, as reflected by the record, and as limited by the Government's Bill of Particulars, will completely clothe appellant Twombly with the garb of guilt with not one stitch of innocence apparent.

However, anticipating that the court will be interested in citations discussing and passing upon the legal propositions involved in appellees reply to this part of appellant's brief and the two succeeding points of appellant's brief, likewise discussed under this heading, we respectfully refer to the following cases:

The case of *Downing v. U. S.*, 35 F. (2d) 454, Ninth Circuit, at p. 458, cited by appellant Twombly in his opening brief, is so applicable to the case at bar, that we specifically call the court's attention to the following:

“* * * and until it is shown that he was participating in an enterprise, the object of which he knew, or should have known, was to defraud, and that if,

considering the circumstances, he honestly and reasonably believes the representations to be true, there is an absence of the requisite criminal intent. In short, it was essential that he act with knowledge of the falsity of the representations or with such recklessness as to imply a willingness to profit by the deceit."

Cochran v. United States, 41 F. (2d) 193 (8th Cir.), at p. 199, the Court said:

"* * * the question after all, is not whether or not Cochran or any of the defendants made money out of the scheme but whether they formed a scheme to defraud and in its execution, used the United States mails."

At page 199, the Court further said:

"* * * In considering this question, it must be borne in mind that the indictment charges the formation of a scheme to obtain money by false representations, and while the conspiracy count was dismissed, yet when such a scheme as is charged in this indictment is criminally participated in by more than one individual, it constitutes in and of itself a conspiracy. *Chambers v. United States* (C. C. A.), 237 F. 513, 524; *Van Riper v. United States* (C. C. A.), 13 F. (2d) 961; *Robinson v. United States* (C. C. A.), 33 F. (2d) 238, 241; *United States v. Herzog* (D. C.), 26 F. (2d) 487."

In the case of *Robinson v. United States*, 33 F. (2d) 238 (9th Cir.), at p. 240, the Court said:

"* * * Furthermore, a scheme to defraud, when shared in by several, becomes a conspiracy, and if a conspiracy exists in fact, the rules of evidence are the same as where a conspiracy is charged. *Belden*

v. United States (C. C. A.), 223 F. 726; Van Riper v. United States (C. C. A.), 13 F. (2d) 961. * * *

“* * * the civil doctrine that a person is bound by the acts of his agent within the scope of his authority has no application to criminal law, and that, if a person is liable at all criminally for the acts of another, such liability must be founded upon authorized acts. Here again the requested instruction entirely ignores the well established rules applicable to conspiracy cases.”

The Bill of Particulars herein very definitely limits the criminal acts alleged to have been committed by appellant and defendant Twombly prior to December 21, 1938. However, the Bill of Particulars also shows appellant's first connection with the activities of the corporations involved herein as of November 1, 1934, and we feel a chronology of the activities of appellant Twombly commencing November 1, 1934 and terminating December 21, 1938, will show him an active participant in the scheme or artifice to defraud and the using or attempting to use the United States mails to execute said scheme or artifice, as alleged in the indictment and found by the jury.

While appellee's brief in the Edgerton appeal in detail shows what had transpired and the present condition of the various companies or corporations involved herein as of November 1, 1934, when appellant Twombly aligned himself with the other defendants herein, we feel that a reiteration of the existing conditions of the companies or corporations as of November 1, 1934, would aid the court in following our contention that, although certain things had transpired previously to appellant Twombly's

connection with said defendants, the appellant Twombly thereafter adopted the scheme or artifice to defraud formulated by the defendants, and was active therein until his termination on December 21, 1938, and when he severed his connection, that all of the essential elements of said scheme or artifice to defraud had taken place and the United States mails had been used to execute or to attempt to execute said scheme or artifice.

On November 1, 1934, appellant and defendant Twombly assumed the general managership of the First Security Deposit Corporation [R. 408-409]. At this time eighty per cent of the assets of Railway Mutual Building and Loan Association previously had been transferred to First Security Deposit Corporation [Plaintiffs' Ex. 134; R. 336-337]; also R. F. D. Discount Company (later changed to Consolidated Investors) had been organized and the First Security and R. F. D. Discount Company were both actively engaged in purchasing at a discount the bonds and securities issued by First Security Deposit Corporation and delivered to former investors of Railway Mutual [R. 147, 161, 528].

It is our contention that while a temporary bridge had been created by the defendants prior to appellant Twombly's connection therewith, separating the legitimate from the illegitimate transactions involved herein, and that the defendants, other than appellant Twombly, had used said temporary bridge in going from legitimate to illegitimate transactions, and had planted the seeds of a scheme and artifice to defraud in said field of illegitimate transactions, that the creation of the Investment Finance Company was the "keystone" of said bridge which they felt made it more secure, and thereafter the appellant and defendant Twombly and the other defendants freely and

actively crossed over into said fields of illegitimate transactions and watered and cultivated the seeds of said scheme and artifice to defraud, and that during appellant Twomby's connection with and prior to his termination thereof of said First Security and Investment Finance Company, said scheme or artifice was brought to a full fruition, and the essential elements involved in the offense herein, to-wit:

- (1) the existence of a scheme to defraud; and
- (2) the placing or causing to be placed in the post office of a letter, postal card, or other available matter for the purpose of executing or attempting to execute said scheme;

were completed as alleged in the indictment and found by the jury.

The first signs of life of the Investment Finance Company occurred on August 21, 1935, at a regular meeting of the board of directors of the First Security Deposit Corporation [Plaintiff's Exhibit 18; R. 371-373], when the following action took place:

"The following directors were present:

Messrs. R. W. Starr,
E. C. Thomas,
A. R. Ireland,
Wm. Leffert,
W. S. Brayton,
C. E. Berry, and
C. W. Twomby.

"I am omitting a portion of the minutes:

'On motion of Mr. Barry, seconded by Mr. Twomby, and carried, it was resolved that:

Whereas, it appears to this Board of Directors that this corporation and its stockholders would be

benefited by having its liquid assets used in some active and profitable business, thereby returning a larger income to this corporation than is now earned by said assets, and

Whereas, it appears to this Board of Directors that the business of loaning money on personal property, especially under the provisions of the Personal Property Loan Brokers' Act of the State of California, is a safe, progressive and lucrative business to be engaged in at the present time, and

Whereas, it appears to this Board of Directors that it would be more practicable to engage in such business through the medium of a separate, corporate entity organized for the general purpose and that the organization of such corporation would be for the benefit of the stockholders and bond holders and creditors of this corporation,

Now, therefore, be it resolved that the Secretary be, and he is hereby, instructed to employ counsel and auditors and incur all necessary expense and take all necessary steps for the purpose of organizing a separate corporation to conduct a general finance business and more particularly, a business of loaning money upon personal property as security; said corporation to be capitalized at Two Hundred Thousand Dollars (\$200,000.00), with one class of common stock to be issued at a par value of One Dollar (\$1.00) per share; said corporation to be governed by a Board of Directors, five in number, and

Be It Further Resolved that said corporation shall be formed in the name of Investment Finance Company, and that the Secretary be, and he is hereby, authorized to purchase not to exceed One Hundred Thousand Dollars (\$100,000.00) worth of common stock of said corporation at such time and times as

he may deem necessary for the best interests of this corporation and the new one to be formed.’”

However, some intervening cause, not disclosed by the record, actuated the directors of First Security Deposit Corporation to invest only One Thousand Dollars (\$1,000.00) in said Investment Finance Company rather than One Hundred Thousand Dollars (\$100,000.00) [R. 287]. Unless, however, that intervening, unknown cause assumed shape and form when eventually the appellant Twombly and the other defendants, by, what we believe, an illegitimate acquisition of stock in said Investment Finance Company, wrested the control from said First Security Deposit Corporation—the First Security Deposit Corporation being the instrumentality pretended to be used to protect the former investors of Railway Mutual who had converted their holdings to those of the First Security Deposit Corporation [R. 288].

Another meeting of the board of directors of the First Security Deposit Corporation, held on November 20, 1935 [R. 373-374] may throw some light on this situation wherein the following proceedings were had:

“The following directors were present:

Messrs. R. W. Starr
E. C. Thomas
A. R. Ireland
Wm. Leffert
W. S. Brayton
C. E. Berry
C. W. Twombly.

“Skipping a portion here.

“On motion of Mr. Berry, seconded by Mr. Thomas, and carried, the Secretary was authorized to

loan to the Investment Finance Company, a sum or sums not to exceed \$50,000.00 and the Secretary refer the matter as regards the procedure involved in the handling of the said loan or loans to H. Dean Campbell for his opinion."

At this stage of our chronological survey of undisputed facts in evidence, as reflected by the record, let us record the official connection of appellant Twombly with the First Security Deposit Corporation and the Investment Finance Company before his termination on December 21, 1938, as set forth in the Government's Bill of Particulars herein.

"(a) As to First Security Deposit Corporation, the defendant Twombly was General Manager from on or about November 1, 1934 to on or about September 21, 1938. He was also Secretary of the First Security Deposit Corporation from on or about November 21, 1934 to on or about September 21, 1938. He was also a Director of said corporation from on or about December 1, 1934 to on or about December 21, 1938. He was a member of the Executive Committee of the said corporation from on or about February 19, 1936 to on or about September 21, 1938.

"As to the Investment Finance Company he was Secretary from on or about September 5, 1935 to on or about September 21, 1938. He was Treasurer from on or about September 5, 1935 to on or about March 7, 1939. He was General Manager to on or about September 21, 1938. He was a member of the Board of Directors from on or about September 5, 1935 to on or about December 21, 1938."

For the sake of argument we will concede that prior to appellant Twombly's connection with either the First Security Deposit Corporation or the Investment Finance Company, the First Security Deposit Corporation had completed the plan and reorganization agreement whereby eighty per cent of the assets of Railway Mutual had been transferred to First Security Deposit Corporation, and said First Security Deposit Corporation had deposited with the Metropolitan Trust Company \$1.10 of its assets for each \$1.00 of bonds issued by said First Security Deposit Corporation, and that among other things, said plan and reorganization agreement provided as follows:

"a new corporation has been organized under the laws of the State of California known as First Security Mortgage Company (later changed to First Security Deposit Corporation) the objects and purposes of the corporation being to loan or to advance money and to take as security therefor securities or property which shall be approved as an appropriate legal investment by the Superintendent of Banks and/or the Commissioner of Corporations of the State of California and to operate a general savings and mortgage business," [R. 291-295; 314-315; 335; 657; 682-683. Plaintiff's Exhibits 131 and 133].

But we maintain that in view of the fact that appellant Twombly acted as general manager of the First Security Deposit Corporation from November 1, 1934 to on or about September 21, 1938, as reflected by Government's Bill of Particulars herein cited, it is reasonable to assume that he familiarized himself with the essential details of said plan and reorganization agreement, the very founda-

tion of said First Security Deposit Corporation, among which we quote the following:

“a new corporation has been organized under the laws of the State of California known as First Security Mortgage Company (later changed to First Security Deposit Corporation) the objects and purposes of the corporation being to loan or to advance money and to take as security therefor securities or property which shall be approved as an appropriate legal investment by the Superintendent of Banks and/or the Commissioner of Corporations of the State of California and to operate a general savings and mortgage business,” [R. 291-295; 314-315; 335; 657; 682-683. Plaintiff’s Exhibits 131 and 133].

The record shows that for some time prior to appellant Twombly’s official connection with First Security Deposit Corporation, he acted as auditor of said company [R. 401, 402], and in his duties as auditor necessarily inspected the books and records of said corporation. Doubtless his work as auditor prompted the officials of First Security to offer him the general managership which he assumed on November 1, 1934.

Appellant and defendant Twombly in his opening brief attempts to characterize himself as an innocent victim in the alleged scheme or artifice to defraud and tries to justify his participation in said scheme or artifice by stating that he remained in his official capacities with the First Security and Investment Finance Company for the pretended purpose of protecting and guarding the interests of the investors of Railway Mutual (Appellants’ Opening Brief, p. 9, lines 21 to 25), who later became bondholders and stockholders of First Security. However, we do not feel the position taken by the appellant is consistent.

During the time appellant Twombly acted as general manager of the First Security, from November 1, 1934 to September 21, 1938, we assume that he drew a minimum salary of \$250 per month, the salary fixed by the board of directors of First Security when appellant Twombly was first employed [R. 409], and appellant admits in his opening brief that the First Security was organized for the pretended purpose of conserving, protecting, and guarding the assets of First Security, which assets represented hard-earned money of countless individuals unfamiliar with, and with no voice in, the affairs of said First Security. We fail to reconcile this position of appellant Twombly as the pretended protector of investors of First Security (Appellant's Opening Brief, p. 9, lines 21 to 25), with his active participation in the organization of Investment Finance Company, his official connection therewith, and the activities of said Investment Finance Company during the time appellant Twombly was connected therewith. Among one of the official acts participated in by appellant Twombly, as general manager of the First Security, was the organization of Investment Finance Company, which company when organized started operating on a little over \$1,000, the First Security having purchased \$1,000 of its capital stock [R. 372-373]. Almost immediately thereafter appellant Twombly again actively participated, as an officer of First Security, in loaning, without security, to Investment Finance Company \$50,000 [R. 373-374]. During appellant Twombly's connection with said First Security, it loaned, without security, to Investment Finance Company large sums of money. The loss suffered by First Security in its dealings with Investment Finance during appellant Twombly's connection therewith we feel was a fraud upon the bondholders

and stockholders, former investors of the Railway Mutual, and if the loss so suffered by First Security through the activities of Investment Finance Company had been preserved, protected, and guarded by First Security, the bondholders and stockholders thereof would have received practically one hundred cents on the dollar for their holdings.

Appellant Twombly's position in so far as defendant Cronk is concerned is likewise inconsistent. On the one hand he raises the question of agency, maintaining that he is not liable for the criminal acts of his agent Cronk, while on the other hand he attempts to exonerate himself from the acts of Cronk because he, appellant Twombly, was not present as a director when Cronk was employed by Investment Finance Company, and later voted to discharge Cronk (Appellant's Opening Brief, p. 15, lines 20 to 23). The decisions cited by appellant Twombly upon the question of agency, academically, correctly recites the law, but they are in no way germane to the case at bar, and we will not take up the time of the court to discuss them.

Appellant Twombly and defendant Cronk were both indicted as having been participants in a scheme or artifice to defraud and for using the United States mails in an attempt to or to execute said scheme or artifice to defraud and the burden was upon the Government to prove, beyond a reasonable doubt, that said appellant Twombly and defendant Cronk committed the acts as alleged in the indictment to constitute a scheme or artifice to defraud and that the United States mails were used to attempt to

or to execute said fraud. In so far as the defendant Cronk is concerned, the jury was not convinced that the acts performed by him alone connected him with or made him a party to said scheme or artifice to defraud as alleged in the indictment, but the jury did find that appellant Twombly adopted, and became a party to, said scheme or artifice to defraud and participated in using the United States mails to attempt to or to execute said scheme or artifice.

While the R. F. D. Discount Company was organized and operating previous to appellant Twombly's connection with either the First Security or the Investment Finance Company, and many of the activities of said R. F. D. Discount Company had taken place, including the Reed Bros. (Mortuary) trust deed whereby the treasury of the R. F. D. Discount became enriched to the amount of \$3,200, money rightfully belonging to the First Security Deposit Corporation for the benefit of former investors of Railway Mutual, which transaction is set out in detail in appellee's reply brief in the Edgerton appeal, we feel it is highly important to note appellant Twombly's activities on November 9, 1936, at which time appellant Twombly was a director of the First Security and a director of the Investment Finance Company; also at this particular time, the First Security controlled the Investment Finance Company. Now just what happened? At a meeting of the board of directors of Investment Finance Company held on November 9, 1936, with the following directors present: R. W. Starr, J. H. Edgerton, E. C. Thomas, C.

W. Twombly (the appellant herein), and J. L. Smale, the following activities were had:

“On motion of Mr. Thomas, seconded by Mr. Edgerton, and carried, it was resolved as follows:

‘Whereas, it appears for the best interests of this corporation that substantially all of the assets of the Consolidated Investors, a California corporation, be purchased by this corporation for a sum not to exceed \$36,000 in cash;

‘Now, Therefore, Be It Resolved, that the officers of this company be and they are hereby authorized to negotiate, enter into all necessary contracts with respect to, and execute any and all necessary instruments necessary to complete the purchase of substantially all of the assets of the Consolidated Investors, a California corporation, including the following securities:

‘3375 shares Common Stock of the First Security Deposit Corporation,

‘2331 shares of Class A Preferred Stock of the First Security Deposit Corporation, with a total par value of \$46,620;

‘827 shares of Class B Preferred Stock of First Security Deposit Corporation, with a total par value of \$16,540;

‘209 Full Paid Income Shares of the Railway Federal Savings & Loan Association, with a total par value of \$20,900 (said shares in the amount of 15,000 being subject to a hypothecation agreement with one F. E. Jones, said hypothecation agreement being guar-

anteed by R. W. Starr, J. H. Edgerton, A. R. Ireland, E. C. Thomas, F. A. Anderson and W. S. Brayton).'" [R. 377-378.]

Very soon thereafter a major portion of the funds received by the directors of Consolidated Investors as enumerated above (while those directors did not include appellant Twombly, they did include some of the directors of First Security) was used in purchasing stock of Investment Finance Company and wresting control of said company from First Security [R. 288]; and whatever profits accrued thereafter to Investment Finance Company, other than a very small amount of stock held by First Security, inured to the benefit of the stockholders of Investment Finance Company, including appellant Twombly.

The record will show that thereafter First Security, with appellant Twombly as an officer and director, loaned large sums of money to Investment Finance Company without security, of which company appellant Twombly was an officer and director. [R. 565-566.]

In answer to appellant Twombly's contention on page 59 of his brief that "there is no evidence to show that appellant ever converted any money or property of anybody under any pretense," see:

Butler v. United States, 53 F. (2d) 800, 804, 806 (10th Cir.).

IT IS NOT NECESSARY THAT ALL THE MISREPRESENTATIONS ALLEGED IN THE INDICTMENT BE PROVEN.

The rule is established by the following cases, that it is sufficient if the government proves the scheme substantially as charged but need not prove all of the misrepresentations alleged:

Levine v. United States, 79 F. (2d) 364 (9th Cir.), p. 369:

“Appellants assign as error the giving of an instruction that ‘It is not necessary that all the misrepresentations alleged in the indictment be proved, but at least some of them must be proved, as charged, to your satisfaction and beyond a reasonable doubt.’ This was a correct statement of the law.”

Also, see:

Havener v. United States, 49 F. (2d) 196 (10th Cir.), p. 199; cert. den. 284 U. S. 644;

Mathews v. United States, 15 F. (2d) 139 (8th Cir.), p. 143:

“The gist of the offense is the use of the mails in execution of the scheme to defraud. It is essential to prove the existence of the scheme. The scheme may be made up of many elements. If so, it is necessary to prove a sufficient number of the elements of the scheme, so that the jury may be justified in finding the existence of the scheme. But no particular element need be proven, if the other elements, when proven, are sufficient to establish the scheme.”

POINT IV.

The discussion of agency is covered under Point III hereof for the reason that in answering Point I of appellant's brief, we have interwoven the question of agency therein and it seems to fit perfectly in logical sequence, and we feel its elimination therefrom would break the continuity of the drama drawn from the activities of appellant Twombly in the alleged scheme or artifice to defraud, as alleged in the Indictment.

POINT V.

Appellee's argument under Point III we feel covers fully the argument advanced by appellant Twombly under Point II and reference is respectfully made thereto.

POINT VI.

Appellant Twombly's Joining the Enterprise and His Participation Therein Renders Him Liable for the Acts of the Other Defendants.

Appellant Twombly, in his brief at page 62 under the heading of "Erroneous Instructions," contends that the instruction given by the trial court [R. 1033], to-wit:

"If you find from the evidence that a situation was caused whereby the persons alleged in the indictment as those persons intended to be defrauded were not able to get as high a price for their securities in the sale of them as they would have, had it not been for the activities of the defendants, other than the defendant Twombly, then you are at liberty to find that the defendants depressed and caused to be depressed

the market price of the securities of the First Security Deposit Corporation as alleged in the indictment. As to defendant Twombly, the plaintiff has limited, by his Bill of Particulars, the activity of that particular defendant, on this particular matter, only as to the bonds of the Company."

is erroneous and ambiguous. In checking the record, we fail to find that appropriate objection and exception to the Court's instruction was made. [See typewritten Bill of Exceptions of Appellant Twombly, pp. 473-476, and the Record, pp. 1035-1042.] After the Court gave the instruction to the jury, he made the following statement:

"I shall now ask counsel for the plaintiff if there are any objections to the instructions?

Mr. Campbell: "No objection, Your Honor."

The Court: "Now, do counsel for the defendants wish to make any objections before the jury or would they prefer to have the jury retire for the purpose of making their objections?"

Then follows certain objections by Counsel Irwin in behalf of his clients, but no objection was made by counsel for appellant Twombly. [R.1036.]

Rule 1, Criminal Appeals of the Ninth Circuit Court of Appeals, provides as follows:

"(a) No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury. The party excepting shall be required before the jury retires to state distinctly the several matters of law in such charge to which he excepts."

As stated in Housel & Walser, Defending and Prosecuting Federal Criminal Cases, page 618, Section 537:

“In general; necessity.

“In the absence of appropriate objection and exception, the refusal, omission, or failure to instruct the jury is not available on appeal. (Pera v. U. S., 11 F. (2d) 772; Frisch v. U. S., 17 F. (2d) 81.) Objections and exceptions to the charge are made at the conclusion thereof and before the jury has retired, thus permitting the Judge to correct it if he sees fit to do so. (Sevensma v. U. S., 278 F. 401.)

“The function of an objection is to point out with particularity to the Court and opposing counsel the alleged error, and give them an opportunity to correct it. An exception reaffirms the objection and preserves the point for the consideration of the appellate courts.”

However, we believe that an answer to appellant Twombly on this particular point will show that appellant Twombly's participation in the various activities, both by himself and the other defendants, renders him liable for the acts of all concerned.

It is to be noted that appellant Twombly in setting out the instruction of the court in his brief on page 62 has not set out its complete language, in that he omitted the last sentence, which is as follows:

“As to the defendant Twombly the plaintiff has limited, by his Bill of Particulars, the activity of that particular defendant on his particular matter only as to the bonds of the company.”

Appellant then attempts to place his interpretation upon the Court's instructions in which he states on page 63 of his brief:

"The Court either said one of two things, and the instruction is so ambiguous that we are unable to tell what the Court meant therefrom. Was the Court indicating that appellant Twombly had nothing to do with the causing of such 'a situation'. Query. Or was the Court indicating that Twombly might not have had anything to do with the causing of such 'a situation,' and yet could be found guilty if the other defendants had caused such 'a situation.' "

We believe that the instruction was not ambiguous. It is very clear that the court instructed the jury in effect, that if they found from the evidence that a situation was caused whereby the persons alleged in the indictment as those persons intended to be defrauded, were not able to get as high a price for their securities in the sale of them as they would have, had it not been for the activities of the defendants (meaning all of the activities of all of the defendants) other than the defendant Twombly whose activities have been limited by the plaintiff's bill of particulars to matters only as to the bonds of the company. In interpreting this particular instruction, we must keep in mind that the evidence shows that the persons alleged in the indictment as those persons intended to be defrauded were approached by the defendants to sell both their bonds and stocks at a reduced price, and, therefore because of the plaintiff's bill of particulars, any activity on the part of Twombly in that regard would be in connection with the bonds only.

However, assuming, but not admitting, that appellant Twombly's interpretation of the court's instruction is cor-

rect, in that the court thereby indicated that Twombly might not have had anything to do with the causing of such "a situation" and yet could be found guilty if the other defendants had caused such "a situation," the evidence in this case shows that appellant Twombly joined the enterprise and thereafter participated in many of its activities as heretofore shown [R. 147; 372-376; 541; 549] including the mailing of letters.

It is a settled rule of law that if there has been a joint contrivance or joint participation with the common purpose, the acts and statements of the one while engaged in carrying into effect the common purpose, are evidence against the other and further, persons joining an existing group engaged in commission of joint crimes assumes responsibility for all done theretofore. It was so held in *Belden v. United States*, 223 F. 726 (C. C. A. 9), at p. 730:

"One or two or more persons may devise a scheme or artifice to defraud, and the statute does not contemplate that, if two or more persons so devise a scheme or artifice, they shall be proceeded against as for a conspiracy to commit the offense denounced. While the government may prosecute for such a conspiracy as it sees fit * * *, yet it need not do so, and may prosecute for the simple offense denounced. In a prosecution for the simple offense, no overt act, as the term is understood in connection with the offense of conspiracy, is essential to be set up, but it must be made to appear that a letter or card, etc., has been mailed for the purpose of carrying into execution the scheme or artifice devised. In the one case the conspiracy is the gist of the offense, while in the other the misuse of the mails is the material thing denounced. * * * It is a common thing to have the

question arise whether one defendant is bound by the statement and acts of another, or of persons not even connected by indictment with the offense charged. And the constant ruling has been that, if there has been a joint contrivance or joint participation with the common purpose the acts and statements of the one, while engaged in carrying into effect the common purpose, are evidence against the other and this without the necessity of alleged conspiracy in the commission of the offense. * * *

In *Chambers v. United States*, 237 F. 513 (C. C. A. 8), the Court said:

“Where two or more persons jointly devise and execute a scheme to defraud by use of the mails, they may thereby become in effect partners in the criminal purpose of so using the mails to defraud. If they do, the acts of each thereafter during the existence and execution of the scheme, done in a furtherance of that execution may become the acts of all the partners,
* * *

In *Van Riper v. United States*, 13 F. (2d) 961 (C. C. A. 2), at page 967, the Court said:

“When men enter into an agreement for an unlawful end, they become *ad hoc* agents for one another, and have made, ‘a partnership in crime’ what one does pursuant to their common purpose all do, and as declarations may be such acts. They are competent against all. * * *.”

In *Silkworth v. United States*, 10 F. (2d) 711 (C. C. A. 2), one Gilbough was joined as a defendant under an indictment charging violation of Section 18, U. S. C. A., Section 338 (Criminal Code 215). Gilbough performed a

minor part in the final consummation of the scheme, but his conviction was affirmed, the Court saying at page 717:

"If his intent was criminal when he joined a dishonest enterprise he was part of the scheme. One man may form and accomplish it with or without assistance; but all who with criminal intent join themselves even slightly with the principal schemer are subject to the statute although they may know nothing but their own share in the aggregate wrongdoing. One man may render the scheme unitary, though he has the assistance of many others at different times."

See, also:

Alexander v. United States, 95 Fed. (2d) 873, 876 (C. C. A. 8).

POINT VII.

With reference to appellant Twombly's Point IV entitled "Motion to Strike," beginning on page 68 of his brief, appellee deems it sufficient to state that appellant Twombly was not prejudiced by reason of any of the alleged assignments of error contained therein; and, furthermore, the matters mentioned in said assignments of error have heretofore been covered, both in this brief and appellee's Answering Brief to appellant Edgerton.

Conclusion.

A study of the record will reveal that from the inception of the trial, until and including the trial court's charge to the jury, appellant and defendant Twombly was afforded a fair and impartial trial. In fact, time after time, the trial court, after long and extended (and, no doubt, exhausting to the court) argument between counsel for the

plaintiff and the defendants over disputed points of law involving the introduction of evidence, the Court very courteously, dispassionately, and without prejudice to defendant and appellant Twombly, made his ruling, keeping alive the limitations created by the Plaintiff's Bill of Particulars in so far as appellant Twombly was concerned and in the admission of evidence affecting defendants, other than appellant and defendant Twombly, the Court made plain to the jury, in simple and understandable language, not fraught with legal phraseology, the purpose of said evidence, stressing the point whenever evidence was admitted which was not to be used against appellant Twombly.

We do not feel that much emphasis should be put upon appellant Twombly's contention that the Court was discourteous, exacting, and unreasonable towards his counsel. This Court will recall that in the heat and intensity of a bitterly contested trial, such as the case at bar, involving many different personalities, that many irritating and immaterial matters arise and thoughtless remarks are made, but in nowise prejudicial to the parties involved. Counsel oftentimes, when working long hours and intensely concerned with the fate of his client in criminal cases, will let his imagination run rampant and give to innocent remarks the wrong interpretations. We feel again that appellant Twombly was in nowise prejudiced by the treatment afforded his counsel by the trial court.

We also feel that a careful examination of the record fails to show that appellant Twombly was prejudiced by the trial court's failure to give his requested instructions, and that there was no prejudicial error as against appell-

lant Twombly in the admission of the evidence as reflected by the record.

In the final analysis, the issues involved here are simple, and concern only two essential elements:

- (1) The existence of a scheme to defraud; and
- (2) The placing or causing to be placed in the post office of a letter, postcard, or other available matter, for the purpose of executing or attempting to execute the scheme.

The jury, laymen, and representing a cross-section, no doubt, of the average citizen, had only to weigh the evidence admitted, and keep their eyes upon and proceed towards the real objective, to-wit: Was a scheme and artifice formulated to defraud? Did appellant Twombly adopt and become a party to said scheme and artifice? Did appellant Twombly participate in the use of the United States mails to attempt to or to execute said scheme and artifice to defraud? all to the satisfaction of the jury beyond a reasonable doubt. The jury so found.

We respectfully submit that the judgment should be affirmed.

CHARLES H. CARR,

United States Attorney;

JAMES L. CRAWFORD,

CLYDE C. DOWNING,

MILDRED L. KLUCKHOHN,

Assistant United States Attorneys,

Attorneys for Appellee.

APPENDIX.

Mr. Campbell: I wish to read a few more minutes—I am reading from plaintiff's Exhibit 36, meeting of May 25th, 1938:

'The following directors were present:

Messrs. R. W. Starr

E. C. Thomas

J. L. Smale

A. R. Ireland

C. W. Twombly.'

Reading in part:

'On motion of Mr. Twombly, seconded by Mr. Ireland, and carried, it was resolved that Mr. Cronk's employment be extended to June 1, 1938.'

Minutes signed 'R. W. Starr, Chairman; C. W. Twombly, Secretary.'

Meeting of June 1, 1938.

'The following directors were present:

Messrs. R. W. Starr

E. C. Thomas

J. L. Smale

A. R. Ireland

C. W. Twombly.

In addition to the directors, Mr. J. H. Edgerton and Mr. C. L. Cronk were present.'

Reading in part:

'On motion of Mr. Smale, seconded by Mr. Ireland, and carried, it was resolved that Mr. Cronk's employment be extended for two weeks.'

Minutes signed 'R. W. Starr, Chairman; C. W. Twombly, Secretary.'

Minutes of June 15, 1938:

'The following directors were present:

Messrs. R. W. Starr

E. C. Thomas

J. L. Smale

A. R. Ireland

C. W. Twombly.

In addition to the directors, Mr. J. H. Edgerton was present.'

Reading in part:

'On motion of Mr. Thomas, seconded by Mr. Smale, and carried, Mr. Cronk's employment was extended until the next regular directors' meeting.

On motion of Mr. Ireland, seconded by Mr. Twombly, and carried, it was resolved that Mr. Cronk be paid at the rate of \$75 per month for automobile expense.'

Minutes are signed 'R. W. Starr, Chairman; C. W. Twombly, Secretary.'

Minutes of July 20, 1938:

'The following directors were present:

Messrs. R. W. Starr

E. C. Thomas

J. L. Smale

A. R. Ireland

C. W. Twombly.

In addition to the directors, Mr. J. H. Edgerton was present.'

Reading in part:

'On motion of Mr. Thomas, seconded by Mr. Smale, and carried, it was resolved that Mr. Cronk's employment be extended for the period of one month.' Signed, 'R. W. Starr, Chairman; C. W. Twombly, Secretary.' " [R. 874-877]